

OCT 25 1993

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
 WASHINGTON, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In Re:)	MM Docket 93-94
)	
Scripps Howard)	File No. BRCT-910603KX
Broadcasting Company)	
)	
For Renewal of License of)	
Station WMAR-TV,)	
Baltimore, Maryland)	
)	
and)	
)	
Four Jacks)	File No. BPCT-910903KE
Broadcasting, Inc.)	
)	
For a Construction Permit for)	
a New Television Facility on)	
Channel 2 at Baltimore, Maryland)	

To: The Honorable Richard L. Sippel
 Presiding Administrative Law Judge

MOTION TO STRIKE

Scripps Howard Broadcasting Company ("Scripps Howard"), licensee of Station WMAR-TV, Baltimore, Maryland and applicant for renewal in the above referenced proceeding, hereby moves to strike three virtually identical paragraphs in each of the Direct Written Case Exhibits of the principals of Four Jacks Broadcasting, Inc. ("Four Jacks") on the grounds that the evidence is irrelevant, immaterial and prejudicial.¹ The paragraphs are a transparent

¹ The paragraphs each begin, "My brothers and I have been greatly involved in the Baltimore community through our operation of our Baltimore station, WBFF(TV) [,]" list a number of charities allegedly assisted by WBFF-TV, and conclude with, "Ronald McDonald House." See Declaration of David D. Smith at 4-5, Declaration of Robert E. Smith at 4-5, Declaration of Frederick G. Smith at 3-4.

attempt to seek civic participation credit in spite of Four Jacks' failure to make timely claims for such credit.

Alleged Civic Participation Of Four Jacks'
Principals Is Immaterial To These Proceedings

1. An issue is material only if it was properly raised. 1 John William Strong, et al., McCormick on Evidence § 185 at 773 (4th ed. 1992). If Four Jacks wanted to claim an enhancement for civic participation, it was required to make its claim in its application or by a timely amendment. Its failure to do so is fatal to the belated claim:

It has long been Commission policy that applicants will not be allowed to amend their applications in a manner that will improve their comparative positions after the cut-off date for amendments as of right, i.e., the "B" cut-off date. This principle serves to avoid the unfair prejudice to other competing applicants whose comparative positions were fixed as of that date and advances the need for administrative finality by requiring that applicants' comparative positions be fixed at some identifiable time.

Northland Communications, 100 F.C.C.2d 914, 915-16 (Rev. Bd. 1985) (participation commitment) (citation omitted), review denied, 60 Rad. Reg. 2d (P & F) 776 (1986); see also J.T. Parker Broadcasting Co., 4 F.C.C. Rcd 7764, 7765 (Rev. Bd. 1989) (divestiture pledge), review denied, FCC 90-237 (July 25, 1990). Nonetheless, Four Jacks' principals now seek civic participation credit by claiming, "My brothers and I have been greatly involved in the Baltimore community through our operation of our Baltimore station, WBFF(TV)." See note 1 supra.

2. In addition to a timely claim in an application, Commission rules require applicants to exchange integration

statements declaring "[w]hether the integrated owners will claim credit for . . . civic involvement in the city of license or service area and if so, specifically on what basis (including a . . . description of civic activities and their duration)" 47 C.F.R. § 1.325(c)(2)(vi) (1992). The Presiding Administrative Law Judge underscored this duty by ordering the parties to "describe in full any qualitative enhancement credits sought" in their integration proposals. Prehearing Conference Order FCC 93M-146, April 2, 1993, at 2. Four Jacks' Integration and Diversification Statement failed to mention civic participation, reinforcing the conclusion that such enhancement is now immaterial.

3. At the Admissions Session, Four Jacks' counsel conceded that a civic participation enhancement claim would be untimely, but argued that evidence of WBFF's civic activities would be admissible as broadcast experience for its principals. See Admissions Session Transcript, vol. 5, Oct. 6, 1993 at 397-401. Under Four Jacks' interpretation, anytime a party failed to claim integration enhancement in its application or integration statement, it would still be able to obtain much of the benefit of the enhancement by simply introducing supporting evidence under some other enhancement that it has claimed.

4. In sum, evidence of civic activities is inadmissible unless Four Jacks properly claimed an enhancement for such activity in a timely manner: "It is well established that an applicant for a broadcast facility cannot improve its comparative position at hearing by proffering evidence that is at variance with its

application." High Sierra Broadcasting, Inc., 96 F.C.C.2d 423, 431 (Rev. Bd. 1983); see also Jarad Broadcasting Co., 1 F.C.C. Rcd 181, 187 (Rev. Bd. 1986), recon. denied, FCC 86R-81 (Rev. Bd. Dec. 23, 1986), review denied in all mat'l respects, FCC 87-312 (Oct. 5, 1987). Four Jacks' testimony is an "impermissible post cut-off upgrading" of its application, ignoring longstanding Commission policy. Charisma Broadcasting Corp., 8 F.C.C. Rcd 864, 867 (1993); see also Alexander S. Klein, Jr., 49 Rad. Reg. 2d (P & F) 606, 615 (1981) ("the need for administrative finality requires that the applicants' comparative positions be fixed at some time"). Four Jacks cannot be allowed to upgrade its comparative position by a "back-door" attempt to gain enhancements for civic participation at this late stage.

Even If Material To These Proceedings,
Four Jacks' Alleged Civic Participation Is Irrelevant

5. Black-letter law places the burden on a proponent to demonstrate the relevance of evidence. 29 Am. Jur. 2d Evidence § 249 (1967) ("If evidence offered by a party is objected to as inadmissible, the party offering the evidence has the burden of establishing its admissibility."); id. at n.3 ("Evidence that is prima facie irrelevant should be rejected unless the person offering it shows how it can be made relevant by connecting it with other facts and circumstances."); see also Clement v. Consolidated Rail Corp., 130 F.R.D. 530, 533 (D.N.J. 1990). Four Jacks has not satisfied -- and cannot satisfy -- this burden.

6. There is no example cited by Four Jacks where civic activities have been credited as relevant to broadcast experience.

Further, there is a specific category of enhancement for civic participation and Four Jacks has advanced no explanation of why its civic activities may be appropriately considered relevant to a different category when they were not offered as proof in the category to which they directly apply.

Failure To Preclude Civic Participation
Evidence Will Unfairly Prejudice Scripps Howard

7. Permitting the introduction of evidence on civic participation now would be prejudicial. First, it would be unfair to permit a belated upgrade by one applicant when such upgrading is not available to the other applicant. See Nugget Broadcasting Co., 8 F.C.C. Rcd 1414, 1416 (Rev. Bd. 1993) ("This rule [precluding post cut-off upgrading] bars the obvious unfairness inherent in allowing one applicant to upgrade its proposal while the others are prevented from making such modifications"). Four Jacks waived any claim for civic participation credit and cannot revive it now.

8. Second, discovery of documentary evidence in this proceeding closed June 28. At this late stage, Scripps Howard cannot effectively gather evidence to confront an overdue claim for civic participation credit.² Furthermore, evidentiary rules would

² Moreover, Four Jacks blocked Scripps Howard's request for "any and all" documents relating to "enhancement credits and preferences sought by the Principals, including . . . civic participation" Motion for Production of Documents, June 11, 1993, at 8; Partial Opposition to Motion for Production, June 16, 1993 at 3 (seeking limitation to "[r]epresentative documents relating to enhancement credits and preferences sought by principals who propose to be integrated into the management of the station at issue") (emphasis added); Order FCC 93M-399,

bar Scripps Howard from introducing the contrary evidence: "A party does not acquire a vested right in the admissibility of otherwise unacceptable evidence by remaining silent when its opponent offers similar evidence. The remedy protecting against disparity of treatment in such circumstances lies in the motion to strike." Chicagoland TV Co., 4 Rad. Reg. 2d (P & F) 882, 885 (Hrg. Ex. 1965).

9. Finally, the weighing of enhancements in a comparative renewal proceeding is not a strictly mechanical process but requires a very subjective evaluation of distinct claims. In such an environment, if the record shows "civic enhancement" evidence, even under the "broadcast experience" criterion, the decision-makers' judgment at some point in the process could be improperly influenced by the offered information even if it has been placed technically in the "broadcast experience" cubby-hole.

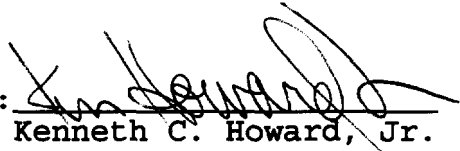
10. An order striking the immaterial and irrelevant evidence is the only proper remedy. See, e.g., American Tel. & Tel. Co., 5 F.C.C.2d 89, 90-91 (1966) (striking testimony on issues not raised in the proceeding; striking testimony which has "no relevance or materiality in the context of the overall presentation"); Beach Broadcasting Ltd. Partnership, 6 F.C.C. Rcd 885, 886 (Rev. Bd.) (where applicant alleged civic participation without adequate explanation, "The ALJ struck these activities and

June 23, 1994 at 3 (granting Four Jacks' request by limiting production to "documents which are representative of any claim for enhancements . . .") (emphasis added).

we agree with this ruling."), review denied and decision modified in part, 6 F.C.C. Rcd 4485 (1991). Scripps Howard is unfairly prejudiced by the inherent unfairness of permitting a tardy upgrade of comparative claims, by its inability to gather evidence of an unannounced claim and by evidentiary rules that would forbid the introduction of such counter evidence anyway. Thus, the offending material should not remain in the record.

WHEREFORE, Scripps Howard Broadcasting Company respectfully moves that the identified paragraphs in the Direct Written Case Exhibits of Four Jacks Broadcasting, Inc. be stricken.

SCRIPPS HOWARD
BROADCASTING COMPANY

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Date: October 25, 1993

Certificate of Service

I, Ruth Omonijo, a secretary in the law offices of Baker & Hostetler, hereby certify that I have caused copies of the foregoing "Motion to Strike" to be hand-delivered this 25th day of October, 1993 to the following:

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